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No. 04-

IN THE

Supreme Court of the United States

EDUARDO MORENO LAPARADE, individually and as Executor of THE ESTATE OF MARIO MORENO REYES,

Petitioner,

v.

COLUMBIA PICTURES INDUSTRIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the fugitive disentitlement doctrine applies to strip a litigant of a statutory right to appeal where the district judge issues an arrest warrant for civil contempt precisely to preclude the litigant from obtaining appellate review.

2. Whether a District Court may, consistent with *Hovey v. Elliott*, 167 U.S. 409 (1897), enter a sanction under Fed. R Civ. P. 16(f) of over $27 million because Plaintiff's counsel missed a scheduling conference.

PARTIES TO THE PROCEEDINGS

The only parties to this proceeding are named in the caption.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	ix
Opinions Below	1
Statement of Jurisdiction	1
Relevant Statutory Provisions	1
Statement	2
1. The Parties	4
2. The 1997 Laparade Suit	5
3. Petitioner's Motion to Dismiss for Lack of Subject Matter Jurisdiction	7
4. Respondent's Counterclaim in the 1997 Suit	8
5. The Extraterritorial Injunctions	12
6. The Bench Trial	6

Contents

Page

7. The Arrest Warrant for Failure to Comply with the Permanent Injunction 15

8. The Case Before Judge Tevrizian 16

9. The Appeal 18

Reasons for Granting the Petition 19

1. Application of the Fugitive Disentitlement Doctrine was Inappropriate 1

2. Judge Rea Lacked Subject Matter Jurisdiction 23

3. Entry of Default Judgment Conflicted With *Hovey v. Elliott* 24

Conclusion 26

TABLE OF CITED AUTHORITIES

CASES

Page

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 23

Cavallo, Ruffalo & Fargnoli v. Torres, 1988 U.S. Dist. LEXIS 16881 (C.D. Cal. Dec. 13, 1988) 13

Cliett v. Hammonds, 305 F.2d 565 (5th Cir. 1962) ... 24

Degen v. United States, 517 U.S. 820 (1996) ...21, 22, 23

Devlin v. Scardelletti, 536 U.S. 1 (2002) 3

Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1 (1983) 7

Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567 (2004) 23

Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909) 25

Heyman v. Kline, 456 F.2d 123 (2d Cir. 1972) 24

Hovey v. Elliott, 167 U.S. 409 (1897) 4, 20, 21, 25

Humble Oil Co. v. Copeland, 398 F.2d 364 (4th Cir. 1968) 13

In re Hern Iron Works, 881 F.2d 722 (9th Cir. 1989) .. 24

Cited Authorities

Page

Insurance Company of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) 9

Kontrick v. Ryan, 540 U.S. 443 (2004) 23

Latrobe Steel Co. v. United Steelworkers of America, 545 F.2d 1336 (3d Cir. 1976) 24

Luckett v. Delpark Inc., 270 U.S. 496 (1926) 5

Metropolitan Life Insurance v. Enright, 231 F. Supp. 275 (S.D.. Cal. 1964) 13

Motorola Credit Corp. v. Uzan, 115 Fed. Appx. 473 (2d Cir. Oct. 22, 2004) 20, 22

Muskrat v. United States, 219 U.S. 346 (1911) 14

Royal v. Leading Edge Products, 833 F.2d 1 (1st Cir. 1987) 5

Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999) 23

Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921) 23

Societe Internationale Pour Participations Industrielles et Commerciales, S.A..v. Rogers, 357 U.S. 197 (1958) 25

Subafilms, Ltd. v. MGM-Pathe Committee, 24 F.3d 1088 (9th Cir. 1998) 13, 14

Cited Authorities

Page

United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988) 3, 22

United States v. $40,877.59 in United States Currency, 32 F.3d 1151 (7th Cir. 1994) 25

United States v. Armour & Co., 402 U.S. 673 (1971) 10

United States v. Cotton, 535 U.S. 625 (2002) 10, 23

Vermont Agency of Natural Resources v. United States, 529 U.S. 765 (2000) 8, 23

Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834) ... 11

STATUTES

17 U.S.C. § 19 (1909, *repealed* 1978) 4

17 U.S.C. § 104A(b) 2, 11, 12, 14, 18

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291, *et seq.* 1

28 U.S.C. § 1335 8

28 U.S.C. § 1338(a) 2, 18

28 U.S.C. § 1367 8

28 U.S.C. § 2201 5

Page

Pub. L. No. 103-465, 108 Stat. 4809 (1994) 19

Pub. L. No. 103-182, 107 Stat. 2057 (1993) 19

RULES

Fed. R. Civ. P. 12(h)(3) 23

Fed. R. Civ. P. 16(f) 2, 4, 17, 24, 25

Fed. R. Civ. P. 60(b) 17, 24

Fed. R. Civ. P. 65 13

OTHER AUTHORITIES

13 *Moore's Federal Practice- Civil* §65.05[1] 12

6 Wright & Miller, *Federal Practice & Procedure* § 1433 8

TABLE OF APPENDICES

Page

Appendix A — Memorandum Of The United States Court Of Appeals For The Ninth Circuit Filed November 5, 2005 ..... 1a

Appendix B — Phase II Bench Trial: Findings Of Fact And Conclusions Of Law Of The United States District Court For The Central District Of California Dated June 7, 2002 ..... 11a

Appendix C — Order Granting Columbia's Motion For Preliminary Injunction Of The United States District Court For The Central District Of California Filed November 20, 2001 ..... 29a

Appendix D — Amended Order Granting Columbia's Motion For Preliminary Injunction Of The United States District Court For The Central District Of California Filed July 31, 2001 ..... 32a

Appendix E — Order Re: Motion For Partial Summary Judgment And Motion To Enjoin Pending Mexican Litigation Of The United States District Court For The Central District Of California Filed May 10, 2000 ..... 45a

Appendix F — Tentative Ruling Of The United States District Court For The Central District Of California Dated July 14, 1997 ..... 58a

Appendix G — Order Of The United States Court Of Appeals For The Ninth Circuit Denying Petition For Rehearing Filed January 11, 2005 ..... 73a

Appendices

Page

Appendix H — Warrant For Arrest From The United States District Court For The Central District Of California Dated July 11, 2003 ..... 76a

Mario Moreno Ivanova and the Estate of Mario Moreno Reyes respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in two consolidated cases, *Eduardo Moreno Laparade v. Columbia Pictures Industries, Inc.*, and *Mario Moreno Ivanova v. Columbia Pictures Industries, Inc.*

OPINIONS BELOW

The opinion of the United States Court of Appeal for the Ninth Circuit (Pet. App. 1-10a) is unpublished. The district courts' memoranda and rulings granting the relief that forms the subject of this petition (Pet. App. B-H) are also unpublished.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on November 5, 2004. Pet. App. 1a-10a. The court of appeals denied rehearing and rehearing en banc on January 11, 2005. Pet. App. 58a-60a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are:

28 U.S.C. § 1291.

> Final decisions of district courts. The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1338(a)

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

17 U.S.C. § 104A(b)

Ownership of restored copyright. A restored work vests initially in the author or initial rightholder of the work as determined by the law of the source country of the work.

Fed. R. Civ. P. 16(f):

If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

STATEMENT

This case presents important questions involving the power of a federal court, acting without subject matter jurisdiction, to strip a civil defendant of his statutory right to appeal unlawful

decisions by issuing an arrest warrant in order to invoke the fugitive disentitlement doctrine. In *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988), this Court held that even a non-party may, on appeal, challenge a civil contempt ruling for lack of subject matter jurisdiction in the underlying litigation, declaring that it is a

> central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power. The courts, no less than the political branches of the government, must respect the limits of their authority.

This principle applies *a fortiorari* where, as here, it is a party appealing, *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

This case presents even more compelling facts than *United States Catholic Conference*: a foreign citizen was involuntarily brought into a civil action in the United States; a trial court, lacking subject matter jurisdiction, proceeded to issue a series of unlawful extraterritorial injunctions and orders with which Petitioner substantially complied; nevertheless, the trial court, *exactly one year after the appeal was filed,* issued an arrest warrant in order to manufacture fugitive status for the express purpose of depriving Petitioner of his right to appeal. The Ninth Circuit dismissed on the fugitive disentitlement ground.

In the ordinary course of litigation, where a party contests non-final rulings, due to the collateral order doctrine the party must suffer a contempt citation and may appeal only after a final judgment is entered. The Ninth Circuit has, however, created a new Catch 22 world for those who have already appealed from a final judgment: where a district court, subsequent to the appeal being filed, issues a civil imprisonment order for the appellant, the appeal will be dismissed on the ground of fugitive disentitlement, thereby denying the appellant the ability to contest the very decision that led to the civil

imprisonment, and even though the arrest warrant cannot itself be contested in the appeal.

Additionally, this case presents the question of whether a federal court may, consistent with *Hovey v. Elliott*, 167 U.S. 409 (1897), enter, without a hearing, a Rule 16(f) sanction against a foreign party in an amount exceeding $27 million, based on trial counsel's failure to attend a scheduling conference.

1. *The Parties*

Petitioner Mario Moreno Ivanova, a Mexican citizen and resident, is the son and the executor of the estate of his late father, Mario Moreno Reyes. In 1940, with the movie *Ahi Esta El Detalle*, Mr. Reyes became an international film star in the Spanish speaking world. Mr. Reyes is best known by his film name "Cantinflas." Mr. Reyes starred in approximately 50 motion pictures. Following *Ahi Esta El Detalle*, Cantinflas became the producer and copyright owner of all his subsequent films. He is regarded as one of Mexico's most important cultural figures, and died in Mexico in 1993.

Respondent Columbia Pictures Industries, Inc. was the long-time distributor of Cantinflas' films, which were in the public domain in the United States for failure to comply with the mandatory affixation of copyright notice provision found in then governing 17 U.S.C. § 19 (1909, *repealed* 1978).

At issue in the courts below were rights in and royalties from the exploitation of 34 of Cantinflas' classic films. Mexico's Instituto del Derecho de Autor (Copyright Office) submitted pre-trial affidavits that Petitioner is the owner of Mexican copyrights. The Mexican government submitted amicus briefs fully supporting Petitioner before the court of appeals and strongly protesting the trial courts' violations of Mexican sovereignty: *all* of the activity that gave rise to the invocation of the fugitive disentitlement doctrine occurred in Mexico and was lawful under Mexican law.

2. *The 1997 Laparade Suit*

This appeal arises out of litigation filed in 1997 by Eduardo Moreno Laparade (Cantinflas' nephew), against Petitioner, Respondent, and others in the United States District Court for the Central District of California. Laparade claimed that he, not Petitioner, owned rights in Cantinflas' films. Laparade's suit was an effort to use the U.S. courts to circumvent an earlier ruling by a Mexican court that Petitioner was the owner of rights in his father's films. The sole competency of the Mexican courts to adjudicate a matter of estate distribution to Mexican citizens of copyrighted works created in Mexico by a Mexican citizen is self-evident.

Laparade alleged that subject matter jurisdiction in U.S. federal court existed on the basis of diversity, the Declaratory Judgment Act (28 U.S.C. § 2201), and a 1994 settlement agreement and Stipulated Judgment entered in response to a 1993 interpleader action brought by Respondent. Columbia alleged in the 1993 interpleader action that, following Cantinflas's death, a dispute existed over entitlement to royalties for the distribution of his films. Columbia's interpleader action did not seek to determine copyright ownership. Even assuming arguendo any role for U.S. courts in this matter, all disputes over royalty distributions arise under state, not federal law, *Luckett v. Delpark Inc.*, 270 U.S. 496 (1926) (patent royalties); *Royal v. Leading Edge Prods.*, 833 F.2d 1, 4 (1st Cir. 1987) (copyright).

In light of the at best limited nature of jurisdiction for its 1993 interpleader, in the 1994 settlement agreement, Respondent acknowledged that Petitioner had agreed to jurisdiction only for the interpleader purpose of the contested distribution of royalties.[1] This understanding was incorporated into the 1994

---

[1] Paragraph 2 of the Settlement Agreement provided:

> Mario Moreno Ivanova . . . hereby appear[s] specially and solely for the limited purpose of giving jurisdiction to this

(Cont'd)

Stipulated Judgment. The Stipulated Judgment decreed that the agreement could not be used as a jurisdictional basis for any future action other than to enforce the specific terms of the Judgment itself. [2]

Laparade's 1997 case was assigned to the same judge who had entered the 1994 Stipulated Judgment, Senior Judge William Rea. As Judge Rea realized, all three of Laparade's grounds for subject matter jurisdiction were fatally flawed. There was no diversity: Laparade and Petitioner are both Mexican citizens. Nor could the 1994 settlement agreement provide a jurisdictional basis for a claim of *rights* in Cantinflas' films: that issue had been decided by the Mexican court. The 1994 Stipulated Judgment provided for retention of jurisdiction only to enforce the royalty distributions, and as noted, issues concerning royalty *distributions* are matter of state, not federal, law. Finally, the Declaratory Judgment Act is a procedural device only, permitting an individual who has a reasonable apprehension of suit to bring the matter before a federal court. The Declaratory Judgment Act does not provide an independent basis for subject matter jurisdiction, *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California,*

(Cont'd)

> Court to enter judgment pursuant to the terms of this stipulation ("the Judgment") and for the enforcement of this stipulation and the Judgment. The parties covenant and agree individually and by their respective attorneys that this special appearance shall not be deemed consent to general jurisdiction by [Ivanova] in this action or any other action, nor a waiver of [Ivanova's] claim of lack of jurisdiction with regard to any other action or proceeding already on file, or which may be filed, in the State of California.

[2] Paragraph 15 of the Stipulated Judgment provided: "The Court will retain jurisdiction over the parties to the Stipulation for Entry of Judgment; Order Thereon, dated [__], for the exclusive purpose of the enforcement of that Stipulation and this Judgment. The Court shall have exclusive jurisdiction to enforce that Stipulation and this Judgment."

463 U.S. 1, 15-16 (1983). There was no independent subject matter jurisdiction ground for Laparade's complaint.

3. *Petitioner's Motion to Dismiss for Lack of Subject Matter Jurisdiction*

Throughout the Laparade litigation, including the appeal to the Ninth Circuit and before this Court, Petitioner has steadfastly and repeatedly challenged subject matter jurisdiction. The lack of subject matter jurisdiction is critical because without it, Judge Rea's subsequent orders and the Ninth Circuit's dismissal of the appeal on the fugitive disentitlement ground must fall.

Petitioner first challenged subject matter jurisdiction in an April 4, 1997 motion to dismiss Laparade's complaint. On July 14, 1997, Judge Rea granted Petitioner's motion, holding with respect to the 1994 Stipulated Judgment that

> The Stipulated Judgment clearly contemplated that Laparade's contractual claim for rights to proceeds from certain Moreno Reyes films would be determined in the Mexican courts, and that whether and to what extent Laparade's claim was deemed valid would determine the distribution of proceeds in the Laparade/Ivanova escrow account. The Judgment reserved jurisdiction by this Court only to determine whether or not such prerequisites – i.e., the final and nonappealable judgment by a Mexican court – had been fulfilled, and to direct and/or approve the subsequent distribution of funds. The judgment clearly did not reserve jurisdiction for this Court to examine the substantive contractual being litigated in the Mexican courts.

Pet. App. 60a.

The Court then addressed its lack of jurisdiction over the complaint:

> Given that the Stipulated Judgment cannot be relied upon as a jurisdictional basis, it is clear that no

> legitimate basis for jurisdiction exists. . . . Ivanova remains a defendant in the action fled by Laparade. As defendant points out, this destroys complete diversity, as there are Mexican defendants on both sides of the case.
>
> The only other jurisdictional basis alleged in plaintiff's complaint is under the Declaratory Judgment Act ... [T]he Declaratory Judgment Act does not provide an independent source of subject matter jurisdiction.

Pet. App. at 67a-68a.

4. *Respondent's Counterclaim in the 1997 Suit*

Respondent Columbia asserted an interpleader action as a counterclaim to Laparade's complaint, joining Petitioner as a defendant. Once plaintiff Laparade's complaint was dismissed for lack of subject matter jurisdiction (as it was), the district court had no power other than to dismiss Columbia's counterclaim, *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 779 (2000), unless the claim was supported by an independent subject matter basis, 6 Wright & Miller, *Federal Practice & Procedure* §1433, at 258. It wasn't.

Columbia did not plead jurisdiction under the Copyright Act, but instead under the Interpleader Act, 28 U.S. § 1335 (or as a fallback under the supplemental jurisdiction, 28 U.S.C. § 1367). There was no genuine interpleader, however, since when the suit was filed, there was no res. The Ninth Circuit, aware of the sham nature of the interpleader, rightly ignored it as a possible basis for jurisdiction. In any event, Columbia's counterclaim provided no more a basis for the exercise of subject matter jurisdiction over Columbia's *ownership* claims than did Laparade's dismissed complaint since Columbia, like Laparade, pled jurisdiction under the 1994 agreement; that agreement concerned royalties, not ownership. Even if the parties had wished to consent to subject matter jurisdiction in order to have Judge Rea decide the issue, they couldn't. As this Court held in

Insurance Company of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982):

> Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court.

A fortiorari where, as here, one party strongly contests subject matter jurisdiction.

Despite the trial court's complete lack of subject matter jurisdiction, and contrary to the 1994 Stipulated Judgment, Judge Rea denied Petitioner's motion to dismiss Respondent's counterclaim.[3] Judge Rea asserted jurisdiction over Columbia's counterclaim based on the reservation of jurisdiction found in the 1994 Stipulated Judgment that, inconsistently, he had just construed as requiring dismissal of plaintiff's complaint. Six pages earlier in the same opinion (quoted in relevant part above), Judge Rea had construed the Stipulated Judgment as vesting jurisdiction "only to determine whether or not such prerequisites – i.e., the final and nonappealable judgment by a Mexican court – had been fulfilled, and to direct and/or approve the subsequent distribution of funds," Pet. App. 60a. What was sauce for the Laparade goose should have been sauce for the Columbia gander. Yet, Judge Rea then held that he possessed subject matter jurisdiction over Columbia's counterclaim because

> the Stipulated Judgment was at least arguably premised upon the notion that Columbia owned the rights to the

[3] In 2000, Petitioner renewed its motion to dismiss Columbia's counterclaim for lack of subject matter jurisdiction. Judge Rea denied this motion on March 27, 2000. In an order dated April 11, 2000, Judge Rea barred Petitioner from raising lack of subject matter jurisdiction in the future.

> subject films, with the sole question for this Court's determination how much and to whom past, present and future royalties were owed by Columbia. At the very least, Columbia appears to be correct in asserting that, if newly raised claims to complete film ownership were to be vindicated, it could invalidate this Court's allocation of future royalties by Columbia in the Stipulated Judgment.

Pet. App. 70a.

This Court has held in the analogous situation of a consent decree that the decree "must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it," *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). Judge Rea's bootstrapped use of "*newly* raised claims" demonstrates that the 1994 agreement did not encompass such claims – otherwise the claims wouldn't be "new." The claims advanced by Columbia in its 1997 counterclaim were not only new temporally, they were new in a subject matter jurisdictional sense: the 1994 agreement dealt with distribution of royalties; the 1997 counterclaim dealt with worldwide ownership of the films.[4] "Arguable premises based on notions" are never an adequate basis for subject matter

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[4] Although Columbia and Judge Rea were in the habit of referring to these rights euphemistically as "film rights," copyright rights is what they were: the exclusive rights to copy, distribute, and publicly perform: that is what Judge Rea enjoined Petitioner from doing and that is what Petitioner was held in contempt for doing. As noted in the second paragraph immediately below, Columbia made a last-ditch effort in 2002 to have Judge Rea rewrite his Phase II decision to assert he had "impliedly" ruled under the Copyright Act. While Judge Rea rejected this request, the request shows Columbia knew exactly the nature of the rights it had been awarded, copyright rights. Unfortunately, there was no subject matter jurisdiction for the award of them.

jurisdiction, and certainly not where, as here, they are not based on any subject matter jurisdictional ground actually pled by the parties or available to the court.

Wholly aside from the text of the settlement agreement, there is another reason subject matter jurisdiction based on the 1994 agreement was lacking over Columbia's ownership claims: Cantinflas' films were in the public domain in the United States until January 1, 1995 (when they were restored as part of 17 U.S.C. § 104A); thus, there were no U.S. ownership claims in 1994. Accordingly, as a matter of law, the 1994 settlement agreement and Stipulated Judgment could not be even "arguably premised upon the notion" that Columbia owned the rights in the films since they were in the public domain in the United States at that time.

Columbia was so hapless jurisdictionally that even when U.S. copyright in Cantinflas' films was subsequently restored on January 1, 1995. Columbia did not, in its 1997 counterclaim, allege jurisdiction under Section 104A.[5] Columbia was quite aware of restored ownership under that provision because, on December 26, 1996, *prior* to filing its counterclaim, pursuant to Section 104A, it had filed with the U.S. Copyright Office twenty "Notices of Intent to Enforce a Restored Copyright" asserting restored rights in Cantinflas' films.

But Columbia did not realize the fatal lack of subject matter jurisdiction in its 1997 counterclaim until 2002, *after* the court had rendered its decision. In an after-the-fact attempt to get the court to rewrite its decision to cure the lack of subject matter jurisdiction, Columbia argued before Judge Rea that he had "impliedly" based his ownership ruling on Section 104A. Judge

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[5] One reason Columbia may have deliberately chose not to allege ownership based on Section 104A is that the provision clearly declares that ownership is to be determined by Mexican law, and Columbia was successfully attempting an end-run around the provision by having Judge Rea create a sui generis, common law copyright, contrary to this Court's decision in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

Rea rejected this effort in an October 29, 2002 ruling declaring the trial was over:

> [Columbia] argues that implicit in its decision, the Court ruled that it is entitled to any restoration rights. The Court, however, does not rule implicitly. The Court made no findings with respect to copyright in the second phase. . . . The decision is an interpretation of contracts as to what rights they attempt to grant, it does not in any way attempt to interpret the Copyright Act. The Court has not decided that Columbia is entitled to any restoration rights under § 104A and it will not.

But without jurisdiction under Section 104A, there was no subject matter jurisdictional basis for Columbia's ownership claims or for the relief Judge Rea granted, as Columbia realized too late. Everything that occurred after the trial court's illicit assumption of subject matter jurisdiction, including the issuance of extraterritorial injunctions, the decisions on the merits, the contempt citation, the arrest warrant, and the preclusion of the appeal based on the fugitive disentitlement doctrine must fall due to the lack of subject matter jurisdiction.

5. *The Extraterritorial Injunctions*

Oddly, the trial court's lack of subject matter jurisdiction seems to have emboldened it to go on an extraterritorial spree. First, on May 10, 2000, Judge Rea enjoined, over their objections, two Mexican citizens, Petitioner and Laparade, from litigating *in Mexico* claims under *Mexican* law. Pet. App. 45a-57a. Judge Rea's ruling was based not on subject matter jurisdiction – none existed – but on personal jurisdiction. That was grievous error. To issue injunctive relief, the court must have subject matter jurisdiction over the dispute *and* there must be a substantive provision of law that authorizes the issuance of the injunction. 13 *Moore's Federal Practice- Civil* §65.05[1]. The May 10, 2000 injunction further represented a reversal of the court's previous rulings that the question of ownership was to be decided by the Mexican courts. By effectively divesting

the Mexican courts of the dispute, Judge Rea exceeded his powers and violated Mexican sovereignty. Not surprisingly, the Mexican government has protested Judge Rea's rulings in amicus briefs submitted on Petitioner's behalf.

Next, on July 31, 2001, a very long four years and three months after the filing of Columbia's counterclaim, Judge Rea preliminarily enjoined Petitioner from exploiting *anywhere in the world* 8 of his father's films, without findings, without a bond (contrary to Fed. R. Civ. P. (c) and (d)) and without any statutory basis authorizing the injunction. Pet. App. 32a-44a. As to these 8 films, Columbia had asserted merely a right of first refusal; a right of first refusal is not an ownership right, *Cavallo, Ruffalo & Fargnoli v. Torres*, 1988 U.S. Dist. LEXIS 16881 (C.D. Cal. Dec. 13, 1988). The alleged right of first refusal was, of necessity, based on a purported contract. But Columbia had not brought a contract action; it had brought an interpleader action for distribution of royalties. Interpleader actions are based on *personal* jurisdiction, *Humble Oil Co. v. Copeland*, 398 F.2d 364, 368 (4th Cir. 1968); *Metropolitan Life Insurance v. Enright*, 231 F. Supp. 275, 278 (S.D. Cal. 1964). There is no basis in the Interpleader Act, contract law, or even the Copyright Act for enjoining extraterritorially a Mexican citizen from distributing films in Mexico films, *Subafilms, Ltd. v. MGM-Pathe Comm.*, 24 F.3d 1088, 1098 (9th Cir. 1998) (en banc), and certainly not where, as here, Petitioner's acts in Mexico were lawful

Judge Rea issued a third extraterritorial injunction on November 20, 2001 (four years and seven months after the counterclaim was filed), preliminarily barring Petitioner from distributing the remaining 26 of his father's films *in Mexico and throughout the world*, again without findings, without a bond (again contrary to Fed. R. Civ. P. 65(c) and (d)), and again without any statutory basis authorizing the injunction. Pet. App. 29a-31a.

6. *The Bench Trial*

After a bench trial, on June 11, 2002, the trial court issued Findings of Fact and Conclusions of Law in what was known as Phase II of the trial. Pet. App.11a-28a. The gist of this order was that Columbia was the owner of worldwide "Film Rights" (a synonym for copyright) in the 26 films subject to the November 20, 2001 preliminary injunction. Columbia had, during the course of the trial disclaimed any rights in the remaining 8 films (those subject to the July 31, 2001 preliminary injunction), yet the Court found that Petitioner had not "proved" it owned rights in these films, Pet. App. 26a-27a. This ruling was contrary to the decisions of the Mexican courts, and to 17 U.S.C. § 104A, which requires application of Mexican law to determine ownership of restored U.S. copyright rights. As to the 8 films, Columbia abandoned even a claim of a right of first refusal. This deprived the court of a case or controversy with respect to these films, the most basic of Article III subject matter requirements, *Muskrat v. United States*, 219 U.S. 346, 356, 359 (1911).

Despite Columbia's abandonment of any claim in 8 of the films and the consequent lack of a case or controversy, the district court permanently enjoined Petitioner, throughout the world, from distributing all 34 films. The absence of any contractual or ownership interest by Columbia in the 8 films was fatal to this injunction: wholly aside from the lack of a case or controversy over the 8 films, where neither party owns an interest in intellectual property, neither party may obtain relief against the other for the distribution of that property. As to the 8 films for which Columbia disclaimed any interest, there is no conceivable subject matter basis for the trial court enjoining Petitioner from distributing them. As to the remaining 26 films, even if Columbia had pled the Copyright Act as the basis for its claim in all 34 films, that Act does not authorize extraterritorial injunctions, *Subafilms, Ltd. v. MGM-Pathe Comm.*, 24 F.3d 1088, 1098 (9th Cir. 1998) (en banc). Nor could the injunction

be justified under the jurisdictional ground that Columbia actually pled, the Interpleader Act.

Judge Rea further ordered Petitioner to turn-over the invaluable, flammable silver nitrate stock film negatives for the movies, despite the fact that Columbia had not pled a cause of action for ownership thereof, and despite the fact that the negatives had been created in Mexico and had been stored in that country for decades by Petitioner's father in special vaults.[6] The turn-over order was also a deep affront to Mexican sovereignty since it compelled a Mexican citizen to turn over property that was created in Mexico and which had resided in Mexico from its inception. That the property constituted an important part of the cultural patrimony of Mexico makes the affront all the greater. On January 28, 2003 the court entered final judgment.

7. *The Arrest Warrant for Failure to Comply with the Permanent Injunction*

Even before the final judgment had been entered, Columbia laid the ground work for issuance of an arrest warrant and use of the fugitive disentitlement doctrine in order to insulate Judge Rea's unlawful orders. When Petitioner refused to comply with the turn-over order and negotiated a distribution agreement for Mexican distribution of the films, on August 20, 20002, Judge Rea held Ivanova in civil contempt. Pet. App. G. Ivanova was held in further contempt on March 31, 2003 and April 28, 2003. An arrest warrant (civil imprisonment order) was issued on July 11, 2003, Pet. App. H, exactly one year after the notice of appeal was filed.

Judge Rea was well aware that Petitioner, a Mexican citizen and resident, would not comply with the arrest warrant: "[i]t is the case that Ivanova lives in Mexico and is not likely to present

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[6] One reason for Petitioner 's reluctance to turn over the negatives was earlier conduct by Judge Rea. When Petitioner had brought a few of the negatives for use as evidence, Judge Rea ordered them confiscated.

himself to a U.S. Marshal for arrest. . . ." Pet. App. G The arrest warrant was nevertheless issued in order (1) to prevent Ivanova from traveling to the United States; (2) to cause the Ninth Circuit to dismiss the then-pending appeal from the court's rulings – the same ones that led to the contempt citations ("[I]f Ivanova refuses to present himself for incarceration, under the 'fugitive disentitlement doctrine' the Ninth Circuit may dismiss the now-pending appeal from this Court's Judgment") (Pet. App. G), and (3) to prevent Ivanova from participating in a lawsuit he had filed against Respondent claiming infringement of his Mexican copyrights. Pet. App. G. The trial court's actions – sanctioned by the court of appeals – represent a serious impairment on the sovereignty of all foreign countries whose citizens are interpled as defendants in cases in U.S. courts: all that a trial court need do to make unlawful rulings appeal proof is to issue an arrest warrant, secure in the knowledge that foreign citizens will not present themselves in the United States for incarceration; due to this manufactured fugitive status, the trial court will know defendant's appeal will be dismissed, and its unlawful rulings thereby made unreviewable. That is exactly what happened here.

The Ninth Circuit's dismissal also creates a Catch 22 world for those who have already appealed from a final judgment: where a district court, subsequent to the appeal being filed, issues a civil imprisonment order for the appellant, the appeal will be dismissed on the ground of fugitive disentitlement, thereby denying the appellant the ability to contest the very decision that led to the civil imprisonment, and even though the arrest warrant cannot itself be contested in the appeal.

8. *The Case Before Judge Tevrizian*

Although Judge Rea determined that Columbia was the owner of "worldwide film rights," he asserted he was not ruling on Petitioner's right to the Mexican copyrights. As the adjudged owner of Mexican copyright rights by the Mexican court, Petitioner filed a transitory tort action in the Central District of

California alleging infringement by Columbia in Mexico. Columbia asserted various counterclaims. The case was assigned to Judge Tevrizian. When Petitioner's trial counsel missed a scheduling conference, Judge Tevrizian on the spot, without notice or a hearing, entered judgment, as a sanction pursuant to Fed. R. Civ. P. 16(f) against Petitioner, and for Columbia on its counterclaims, awarding Columbia Petitioner's Mexican copyrights, awarding to Columbia a $25 million judgment, an escrow account of $2.1 million, $461,500 in damages, and injunctive relief that included an order for Petitioner to withdraw copyright registrations it had obtained in Mexico and the United States.[7] Judge Tevrizian then denied Petitioner's Fed. R. Civ. P. 60(b) motion for relief from the sanction.

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[7] THE COURT: All right. The Plaintiff is not here. And this is a regularly scheduled conference. There is a history of contempt that has been employed by Judge Rea with regard to the Plaintiff's counsel in this case. He has not appeared today. So what I am going to do is, as a sanction for not appearing today, I'm going to grant judgment in favor of Columbia on the Mexican copyright claims; finding the Mexican copyright – the Plaintiff has no interest in those claims.

Did you seek to have an – the copyright claims affirmative[ly] stated in favor of Columbia?

MR. TASHMAN (Columbia's counsel): Yes, we did, you[r] Honor.

THE COURT: All right. The[n] I'll assert – affirmatively assert the owner of the copyright to the Mexican – the Mexican copyright in, I believe there's 7 films?

MR. TASHMAN: I think, you[r] Honor, that there are 32 films in which Columbia claims ownership of the Mexican copyrights.

. . .

MR. TASHMAN: Your Honor, in addition to the Mexican copyrights claims, Columbia has asserted certain related claims

(Cont'd)

When Petitioner failed to withdraw his Mexican copyright registrations, Judge Tevrizian issued an arrest warrant expressly "to allow Columbia to assert the fugitive disentitlement doctrine with respect to the appeal," which had, by then, been briefed. This too created a Catch 22 situation for Ivanova: his appeal faced dismissal under the fugitive disentitlement doctrine due to the issuance of an arrest warrant after the appeal was taken, even though the arrest warrant was not part of the appeal.

9. *The Appeal*

The Ninth Circuit's November 4, 2005 opinion mistakenly assumed that Judge Rea (and therefore it) possessed subject matter jurisdiction under the Copyright Act: "The district court had subject matter jurisdiction pursuant to 17 U.S.C. §104A and 28 U.S.C. § 1338(a)." Pet. App. 7a. As noted above, Judge Rea had rejected Columbia's argument that he had even impliedly ruled pursuant to these provisions. Nevertheless, the court of appeals followed both Judge Rea and Judge Tevrizian's open suggestions that their orders not be reviewed pursuant to the fugitive disentitlement doctrine, and dismissed the appeal on that ground. (Pet. App. 7a-8a). Petitioner timely sought rehearing and rehearing en banc which was denied. (Pet. App. 58a-60a).

This petition followed.

(Cont'd)

> in terms of tortuous interference and [to] quiet title. We would ask that the Court also enter judgment in Columbia's favor on those claims as well.
>
> . . .
>
> THE COURT: You'll prepare a judgment for my signature.
>
> . . .
>
> THE COURT: . . . All right. Plaintiff's counsel failed to appear in this case. I will order judgment as set forth, and that is that Columbia Pictures is entitled to recover on its counter-claim[s].

REASONS FOR GRANTING THE PETITION

This case presents questions of profound importance that merit certiorari: the trial courts' actions in this case – sanctioned by the court of appeals – represent a grave threat to the integrity of the judicial process: in order to strip a civil litigant of his right to appeal, the trial courts issued arrest warrants, after the appeals had been filed, knowing that Petitioner, a foreign citizen would not present himself for incarceration. The purpose of the arrest warrants was, openly, to obtain dismissal of *pending* appeals by resort to the fugitive disentitlement doctrine. Moreover, since the arrest warrants were issued after the appeal was filed, they were not a part of the appeal even though they resulted in dismissal of it.

This Court has permitted use of the fugitive disentitlement doctrine only in narrow circumstances, and never where, as here, the fugitive status is deliberately manufactured by the trial court in order to cause the dismissal of a pending appeal.

The *ultra vires* conduct by Judge Rea – sanctioned by the Ninth Circuit – also raises important international issues: the extraterritorial injunctions entered below barred Petitioner, a Mexican citizen, from litigating issues of Mexican law against another Mexican citizen in the courts of Mexico, and from engaging in acts that were lawful in Mexico. By so doing, the trial court stripped Petitioner of copyrights that vested under Mexican law as well as U.S. copyrights the Mexican government had negotiated for and obtained in the NAFTA Trade Agreement (Pub. L. No. No. 103-182, 107 Stat. 2057 (1993)) and in the 1994 GATT Trade Agreement (Pub. L. No. 103-465, 108 Stat. 4809 (1994)). As a result, the United States has become needlessly enmeshed in an international trade dispute with the Government of Mexico. Unless reversed by this Court, the lower courts' actions may lead to the filing of a complaint by the Mexican government against the United States with the World Trade Organization.

Moreover, the Ninth Circuit's decision conflicts with the Second Circuit's decision in *Motorola Credit Corp. v. Uzan*, 115 Fed. Appx. 473 (2d Cir. Oct. 22, 2004). *Motorola* refused to apply the fugitive disentitlement doctrine on similar facts. The contemnors in *Motorola Credit Corp.* were foreign citizens, who

> have resided in a foreign country all along, and were "present" in the Southern District in the barest sense necessary to support personal jurisdiction ... [W]e believe that a nonresident who appeals an adverse judgment is in a different position than the typical fugitive who leaves a jurisdiction for the sole purpose if evading a judgment.

Id. at 475. Additionally as here, the Second Circuit observed that the "appeal principally involves discrete challenges to the District Court's subject matter jurisdiction that can be adjudicated without the appellants being present either before the District Court or before this Court." *Id.*

Finally, the entry of a Rule 16(f) sanction of over $27 million against a party for it's counsel's for failure to attend a scheduling conference conflicts with this Court's opinion in *Hovey v. Elliott*, 167 U.S. 409 (1897).

1. Application of the Fugitive Disentitlement Doctrine was Inappropriate

In both suits, the fugitive disentitlement doctrine was utilized in a manner never permitted to this Court, and which cannot withstand constitutional scrutiny: both arrest warrants were issued during the pendency of the appeal and for the express purpose of invoking the doctrine in order to cause Petitioner's appeal to be dismissed. In the case before Judge Rea, the arrest warrant was issued on July 11, 2003, exactly one year after Petitioner had filed its appeal and approximately five months after Petitioner had filed its opening brief. In the case before Judge Tevrizian, the arrest warrant was issued on June 7, 2004.

Petitioner's opening brief had been filed on February 6, 2004. Respondent's reply brief had been filed on April 5, 2004. In both cases the arrest warrants were issued *after* the appeal had been submitted, they were not, themselves, part of the appeal, yet their existence – brought to the circuit's attention by Respondent – acted to strip Petitioner of his right to appeal from the very decisions that led to the warrants being issued.

As a result of Judge Rea's lack of subject matter jurisdiction and Judge Tevrizian's lack of authority to order withdrawal of Petitioner's Mexican copyright registrations, application of the fugitive disentitlement doctrine was wrong as a matter of law: no valid arrest warrant can be issued for violating an invalid contempt order issued for failure to comply with an invalid injunction.

In *Degen v. United States*, 517 U.S. 820, 828 (1996) – the last time the fugitive disentitlement doctrine was reviewed by this Court – it was held: "The right of a citizen to defend his property against attack in a court is corollary to the plaintiff's right to sue there. . . . For this reason we have held it unconstitutional to use disentitlement similar to this . . . for contempt of court, *Hovey v. Elliott*, 167 U.S. 409, 413-414 (1897)."

The considerations that led the Court in *Degen* to grant certiorari – misuse of judicial power – exist even more strongly in this case. In the case before Judge Rea, Ivanova, a foreign citizen, had been involuntarily interpled. Unlike *Degen*, the fugitive disentitlement doctrine was not invoked against a criminal defendant who fled the jurisdiction after which he appealed a related civil forfeiture action brought by the Government; rather, the fugitive disentitlement was concocted by Columbia to preclude Petitioner's *pending* appeal from clearly invalid extraterritorial relief issued without subject matter jurisdiction. Indeed, Petitioner was not even a fugitive: he had resided the entire time in Mexico, and was brought into the 1994 and 1997 actions by *others*, first by Respondent, and then

by Laparade. As the Second Circuit held in *Motorola Credit Corp. v. Uzan*, 115 Fed. Appx. 473, 475 (2d Cir. Oct. 22, 2004): "[W]e believe that a nonresident who appeals an adverse judgment is in a different position than the typical fugitive who leaves a jurisdiction for the sole purpose if evading a judgment."

In the case before Judge Tevrizian, the fugitive disentitlement doctrine was used to preclude a pending appeal from a $27 million judgment entered without a hearing for failure to attend a scheduling conference. Use of the fugitive disentitlement for the express purpose of insulating from appellate review misuses of judicial power is itself a misuse of judicial power and cannot be countenanced.

In *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988), in which this Court held that even a non-party may challenge a civil contempt ruling for lack of subject matter jurisdiction in the underlying litigation, declaring that it is a "central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power. The courts, no less than the political branches of the government, must respect the limits of their authority." [8]

In *Degen* this Court noted the limited circumstances in which the fugitive disentitlement doctrine could be applied and the adverse consequences that flowed when, as here, it is used inappropriately:

> [T]he sanction of disentitlement is most severe and so could disserve the dignitary purposes for which it is invoked. The dignity of a court derives from the respect accorded its judgments. That respect is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits.

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[8] The contempt finding in that case had been issued for failure to comply with a subpoena duces tecum.

517 U.S. at 828. The indefensible merits of the rulings were, in these cases, precisely what the trial courts wished to insulate from appeal by their manufactured creation of the fugitive disentitlement doctrine. This Court has evidenced increasing concern over the use of the fugitive disentitlement doctrine and has barred its use in cases with far, far less compelling circumstances. If the use of the doctrine is permitted to stand in these cases, trial courts will have a roadmap for the most egregious abuses of power conceivable.

2. *Judge Rea Lacked Subject Matter Jurisdiction*

In *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 778-779 (2000), this Court held: "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is of announcing that fact and dismissing the case. . . ." *See also United States v. Cotton*, 535 U.S. 625, 630 (2002); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999). The lack of subject matter goes directly to the heart of the federal court's limited jurisdiction and for this reason the courts are under an unflagging obligation to ensure that they possess it. As a result, the lack of subject matter jurisdiction may be raised at any time and cannot be waived, FRCP 12(h)(3) ("Whether it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."); *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567 (2004); *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004) ("A litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance"); *United States v. Cotton*, 535 U.S. 625, 630 (2002) ("subject matter jurisdiction ... involves a court's power to hear a case, [and] can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in [the] district court"); *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). Indeed, in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921), this Court raised the issue *sua sponte*.

For the reasons detailed above, there is no doubt Judge Rea lacked subject matter jurisdiction over the 1997 action. Where the court lacks subject matter jurisdiction, its orders are void ab initio and may be ignored without fear of penalty. Lower courts have held that the invalidity of the underlying order is always a defense to a civil contempt charge. *See, e.g.*, *Heyman v. Kline*, 456 F.2d 123, 131 (2d Cir. 1972); *Latrobe Steel Co. v. United Steelworkers of America*, 545 F.2d 1336, 1347 (3d Cir. 1976); *Cliett v .Hammonds*, 305 F.2d 565, 570 (5th Cir. 1962); *In re Hern Iron Works*, 881 F.2d 722, 726 n.11 (9th Cir. 1989).

Judge Rea engaged in repeated, shocking abuses of power, enjoining Mexican citizens from litigating issues of Mexican law in Mexican courts, issuing extraterritorial injunctions, and ordering a son to turn over to an American corporation invaluable film negatives that his father had carefully stored in Mexico for years – all with a complete lack of subject matter jurisdiction. In the case before Judge Tevrizian, while the court had subject matter jurisdiction over the type of dispute, it lacked jurisdiction to order Plaintiff extraterritorially withdraw Mexican copyright registrations – tellingly, the Court did not cite to any authority either. Accordingly, the issuance of an arrest warrant for failure to comply with the invalid injunction was void.

3. *Entry of Default Judgment Conflicted With Hovey v. Elliott*

Certiorari is also required to correct a second abuse of process, the entry of a Rule 16(f) sanction in Judge Tevrizian's case. After Petitioner's counsel missed a single scheduling conference, Judge Tevrizian, without a hearing, entered on the spot as a sanction under Fed. R. Civ. P. 16(f) judgment against Petitioner on his claims and for Defendant on its counterclaims, in an amount that exceeded $27 million. The court then denied Petitioner's Rule 60(b) motion. The court next purposefully insulated itself from appellate review under the fugitive disentitlement doctrine, by issuing an arrest warrant for

Petitioner after Petitioner failed to withdraw his Mexican copyright registrations, and *after* the appeal was pending.

The sanctions issued by Judge Tevrizian under Rule 16(f) cannot conceivably be deemed an order that is, within the rule itself "just." The sanction was entered not against the attorney who missed the conference, but against a foreign party. A $27 million sanction in such a circumstance is also contrary to this Court's decision in *Hovey v. Elliott*, 167 U.S. 409 (1897). *Hovey* held that

> [t]o say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

Id. at 414.[9]

Citing *Hovey*, the Seventh Circuit has written "The courts have a duty to render just decisions that are in accordance with the law, and without a fair hearing, that cannot be done. Though individuals may act disrespectfully to the court, the court must nonetheless act justly." *United States v. $40,877.59 in United States Currency*, 32 F.3d 1151, 1157 (7th Cir. 1994). In this case, plaintiff's counsel did not act disrespectfully. Failure to attend a scheduling conference should not be condoned, but neither can it form the basis for a sanction that includes an award of substantive rights worth in excess of $27 million. Frequently, trial courts schedule over a dozen very brief appearances for the same time period, known to practicing lawyers as "cattle calls." The failure of one party to show up works at best only a

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[9] Unlike *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 349-354 (1909) and *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 206-212 (1958), there is no allegation Petitioner failed to produce documents.

modest annoyance to the court. A modest fine would get the attention of counsel and ensure future compliance, for even modest fines will eventually be reported to malpractice insurance carriers and bar associations.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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